LANDYE BENNETT BLUMSTEIN LLP
ATTORNEYS

THANE W. TIENSON, P.C.
ttienson@lbblawyers.com
Admitted in Oregon and Washington

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VIA EMAIL (consultation@bia.gov)
AND U.S. MAIL
Subject: 1076-AF18

Elizabeth Appel
Office of Regulatory Affairs and
Collaborative Action
U.S. Department of Interior
1849 C Street NW, MS 4141
Washington, D.C. 20240

Re: ***Comments on the Discussion Draft of Proposed Revisions to Regulations on Federal Acknowledgment of Indian Tribes (25 C.F.R., Part 83)***

Dear Ms. Appel:

INTRODUCTION

I represent the Columbia River Crab Fishermen's Association (CRCFA) and one of its individual members, William Rhodes, and these comments are made with their authorization and on their behalf. CRCFA is a non-profit group organized under the laws of the State of Washington, headquartered in Pacific County, Washington, near the mouth of the Columbia River. Both CRCFA and Mr. Rhodes believes they qualify as an "Interested Party" because, as set forth in greater detail below, CRCFA and Mr. Rhodes constitute a person, organization, or other entity who can establish a legal, factual, or property interest in the Acknowledgment determination, and they request an opportunity to submit comments or evidence and to be kept informed of general actions regarding a specific petitioner. That specific petitioner is the Chinook Indian Tribe/Chinook Nation (Chinook). Regardless of their Interested Party status, CRCFA and Mr. Rhodes are certainly Informed Parties because they are an organization and a person who requests an opportunity to submit comments or evidence and to be kept informed of general actions regarding the Chinook's desire to be Acknowledged as an Indian Tribe, and both CRCFA and its members, including Mr. Rhodes, "might be affected by an Acknowledgment determination for the Chinook because they are located and operate their commercial fishing businesses in the same community anda area in which the Chinook are located.

CRCFA and Mr. Rhodes are concerned about the proposed regulatory changes to the extent they may allow a successful petitioner to argue that Acknowledgment includes acquisition of fishing rights. We believe that the regulations need to make clear that formal Acknowledgment and the factual and legal bases for it cannot be used as evidence to secure fishing rights that petitioner currently do not possess. If such rights are to be, or even may be,

included as an adjunct to its Acknowledgment, or if there is any possibility that Acknowledgment and/or the factual and legal bases for obtaining it may be used by the Chinook or other petitioners to attempt to secure fishing rights, then the CRCFA and its members request further amendments to the proposed regulations as explained below.

A. CRCFA and William Rhodes' Status as an Interested Party.

CRCFA is officially recognized by the State of Washington. Its representatives are members of the official State of Washington Department of Fish and Wildlife Coastal Dungeness Crab Advisory Group, created by the Director of the Department. Both CRCFA and its members qualify as Interested Parties for purposes of public comments. All of CRCFA's members, including William Rhodes, are owners of commercial fishing businesses and are holders of Washington Dungeness Crab-Coastal Fishery licenses. Many of CRCFA's members, including Mr. Rhodes, are also commercial salmon fishermen and holders of Oregon commercial Dungeness crab fishing licenses and permits. These species are fished for pursuant to government-issued limited entry commercial fishing licenses. Only a limited number of such licenses have been issued, and no more licenses will be issued. The licenses allow the license holder to commercially fish for Dungeness crab in the waters of the Columbia River, Willapa Bay, Grays Harbor, and the Pacific Ocean off the coast of Washington state. This is the same geographic area claimed by the Chinook as their "usual and accustomed" fishing grounds. Commercial salmon fishing licenses allow the holder to fish in a broader geographic area, but CRCFA's traditional fishing grounds are generally the same for all fisheries. These limited entry licenses have substantial monetary value and are bought and sold. The crab and salmon harvested each year by CRCFA members also have substantial commercial value. The value of those licenses and catch levels will diminish considerably if the Chinook acquire fishing rights by virtue of Acknowledgment, and that diminution in value will result in a corresponding diminution in value of the commercial fishing businesses of CRCFA members, including Mr. Rhodes.

CRCFA's members therefore have a "property interest" and a "legal interest" in their commercial fishing licenses that might be affected by an Acknowledgment determination by the Chinook. Their property interest in their Dungeness crab fishing licenses exists by virtue of the License Limitation Program for the coastal Dungeness crab fishery and the crab pot (fishing gear) limits for that fishery. *See* Revised Code of Washington (RCW) 75.30.250, *et seq.* There is a similar limited entry license program in place for commercial salmon fishermen and Oregon commercial crab fishermen, which serves to create an additional property interest.

CRCFA is an association that supports itself by taxing its members based upon the poundage of coastal Dungeness crab caught by its members. The greater the poundage caught by

any member, the greater the contribution to the Association by that member. Conversely, the lower the poundage caught, the lower the contribution to the Association. The acquisition of fishing rights by the Chinook would necessarily further reduce the catch or harvest level of Dungeness crab, salmon, and other commercially fished species by CRCFA's members, and thus would not only adversely affect the members of CRCFA and their commercial fishing businesses, but it would also adversely affect CRCFA itself.

B. Factual and Legal Bases for Concern Regarding Acknowledgment of the Chinook.

The concern voiced by the CRCFA concerning the potential impact of Acknowledgment of the Chinook to support a claim that Acknowledgment as an Indian Tribe confers fishing and other natural resource rights is based upon several factors. One is the statements by Chinook Tribal leaders in conjunction with the Tribe's earlier unsuccessful bid for Acknowledgment in 2001.

Catch opportunities for Washington non-treaty commercial crab fishermen are already limited each year for the coastal Dungeness crab fishery because of the need to ensure that Quinault Indian Nation members are able to exercise their full treaty rights to harvest Dungeness crab, which treaty fishing rights were recognized by the federal court in the mid-1990's. That treaty right was interpreted to confer a harvest opportunity for the Quinault of up to 50% of all crab and fish in their usual and accustomed grounds. *See U.S. v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd*, 86 F.3d 1499 (1996). Unlike the 1855 Treaty of Olympia which was entered into with the Quinault Tribes, the 1851 Point Tansey Treaty with the Chinook Tribe was never ratified by Congress and therefore never took effect and efforts by the Chinook to enforce their unratified treaty in the courts have been unsuccessful. *See Halbert v. U.S.*, 283 U.S. 753 (1931); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, No. C89-58R (W.D. Wash. Oct. 16, 1989); and *Wahkiakum Bank of Chinook Indian v. Bateman*, 655 F.2d 176 (9th Cir. 1981). However, from the language of the unratified Treaty, which was similar in text to that of the other Northwest Indian Treaties, it probably would have been interpreted to provide for fishing rights for the Chinook Tribal members if it had been ratified.

CRCFA is particularly concerned because of the language used by former Assistant Interior Secretary and BIA Director Kevin Gover in rendering his Final Determination Acknowledging the Chinook in 2001. In issuing the Final Determination, Mr. Gover falsely characterized a 1912 federal statute, the Act of Aug. 12, 1912 [ch. 388, § 19, 62 Stat. 535] as constituting "... a constructive ratification of the unratified 1851 U.S. Treaty with the Chinook, the Point Tansey Treaty." Assistant Secretary Gover then went on to inaccurately characterize a second federal statute, the Act of Feb. 12, 1925 [ch. 214, 43 Stat. 886] as a statute that "vests jurisdiction in the [United States] Court of Claims to hear and determine legal and equitable

claims arising out of the unratified [1851 Point Tansey] treaty." *See* Final Determination to Acknowledge the Chinook Indian Tribe/Chinook Nation (formerly Chinook Indian Tribe, Inc.), 66 F.R. 1690-91, Jan. 9, 2001. Chinook Indian Tribal members then used this language of former Assistant Secretary Gover to argue that the Acknowledgment of the Chinook as an Indian Tribe therefore meant that Tribal members had treaty rights to fish in their usual and accustomed fishing grounds under the unratified 1851 Point Tansey Treaty, which included fishing and crabbing rights of their own on the Columbia River and Willapa Bay, the same areas where CRCFA's members have fished for generations.

Thus, the potential assertion of fishing rights by the Chinook following Acknowledgment is a very real prospect and poses an obvious concern for the CRCFA and its members, all of whom hold limited entry fishing licenses entitling them to fish in the Columbia River and Willapa Bay, and in the waters of the Pacific Ocean adjacent to Washington state and northern Oregon for coastal Dungeness crab, which the Chinook identify as their usual and accustomed fishing grounds. Former Assistant Interior Secretary Gover's interpretation of these earlier Congressional Acts was inaccurate and completely at odds with the interpretation of the Act by both the Department of the Interior and federal courts, and the Final Determination was later overturned on appeal.

C. Recommended Regulatory Revisions.

It is not evident from the text of the proposed rule changes regarding Acknowledgment, however, whether those rule changes are intended to reflect conclusions regarding successorship in interest to a particular treaty or other rights, or whether they may be interpreted to so reflect or be used as evidence of acquisition of such rights.

One such potential regulatory change that would serve to eliminate the potential confusion regarding the effect of an Acknowledgment determination on such issues is to amend the language set forth in § 83.2 "Purpose" to include an additional sentence that states, "Acknowledgment does not serve to constitute a constructive ratification of a previously unratified Treaty, in whole or in part, and Acknowledgment cannot be used as evidence in any subsequent proceeding to support such a contention." We recommend that such a further amendment be adopted.

Further, CRCFA and its members, including Mr. Rhodes, also have concerns regarding the proposed changes to § 83.10 of the regulations. Initially, subsection (l), now subsection (m), provided for consultation by the Assistant Secretary with Interested Parties to determine time frames to submit arguments and evidence challenging proposed findings. Now, it appears from the proposed regulatory language changes that Interested Parties, generally, are not permitted to

submit arguments and evidence challenging proposed findings, and that instead only state or local governments where the petitioner's office is located may do so, or any federally-recognized Indian Tribe within the State. *See* proposed changes to § 83.10(m)(1) and (2). We believe that the language in subsection (m)(2) should be broadened to include Interested Parties. Such a change would also appear to be consistent with the proposed changes to subsection (n) which still allows Interested Parties to be notified of the date that consideration of all of the evidence in the petition records begins in conjunction with the making of a final determination, and also consistent with the provision in subsection (n)(2) that mandates the OHA or AS-IA, upon request from a petitioner or from an Interested Party, to hold a hearing "on the reasoning, analyses, and factual bases for the proposed finding, comments, and responses." It is difficult to reconcile how an Interested Party can request a hearing and participate in that hearing, but then not be allowed to submit arguments and evidence challenging any of the proposed findings in conjunction with the petition for Acknowledgment.

Therefore, we strongly urge that § 83.10(m)(2) be further revised to include "Interested Parties" among the persons and entities permitted to submit arguments and evidence challenging the proposed findings.

Thank you for allowing us this opportunity to comment.

Sincerely,

Thane W. Tienson

/jz
Cc: Dwight Eager
Dale Beasley
William Rhodes